

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JASON LEE KEIPER,

Defendant-Appellant.

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UNPUBLISHED

November 12, 2013

No. 310472

Barry Circuit Court

LC No. 11-100158-FC

Before: FITZGERALD, P.J., and MARKEY and BECKERING, JJ.

PER CURIAM.

A jury convicted defendant of first-degree murder, MCL 750.316, and the trial court sentenced him as a fourth-offense habitual offender, MCL 769.12, to a prison term of life without the possibility of parole. Defendant appeals as of right. We affirm.

Defendant argues that his due process rights were violated because his ankles were wrongly shackled and that he received ineffective assistance of counsel because of counsel's failure to object to the shackling. We disagree.

Generally, this court reviews for an abuse of discretion the trial court's decision to shackle a defendant at trial. *People v Payne*, 295 Mich App 181, 186; 774 NW2d 714 (2009). However, to preserve an issue, the appellant must challenge it before the trial court. *People v Kimble*, 470 Mich 305, 309; 684 W2d 669 (2004); *People v Danto*, 294 Mich App 596, 605; 822 NW2d 600 (2012). Here, defendant did not challenge the trial court's use of shackles.<sup>1</sup> We conclude that defendant has not preserved this issue. This Court reviews unpreserved issues for

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<sup>1</sup> The record is devoid of any discussion regarding the use of ankle shackles, and we are unable to determine what discussions, if any, took place off the record regarding the use of the ankle shackles. Consequently, we are unable to determine from the record before us whether a state interest specific to the trial, such as preventing defendant from escaping, injuring others in the courtroom, or maintaining order in the courtroom, was served by the use of the restraints. See, e.g., *Deck v Missouri*, 544 US 622, 629; 125 S Ct 2007; 161 L Ed 2d 953 (2005); *People v Dunn*, 446 Mich 409, 425; 521 NW2d 255 (1994).

plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

"Freedom from shackling is an important component of a fair trial." *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996). When a defendant appears before a jury in shackles, it "negatively affects the defendant's constitutionally guaranteed presumption of innocence." *People v Banks*, 249 Mich App 247, 256; 642 NW2d 351 (2002); see *Dunn*, 446 Mich 425 n 26. In Michigan, if a juror inadvertently sees a defendant in restraints, the defendant must show that he or she was prejudiced. *People v Horn*, 279 Mich App 31, 37; 755 NW2d 212 (2008).

During voir dire, the prosecutor questioned the potential jurors as follows:

Q. [S]ome of you may have noticed some security devices on the defendant. Does everyone agree that has nothing to do with guilt or innocence and is simply the way the deputies maintain the courtroom security?

A. [No verbal response.]

Q. Is there anyone that's gonna think he's guilty just because of that?

A. [No verbal response.]

Subsequently, defense counsel stated, "The prosecutor pointed out that my client is wearing ankle bracelets. I can hear them. It sounds like Christmastime. You can all hear them, too, probably." He then asked, "Anybody think he must be guilty of something if he's in handcuffs?" The potential jurors gave no response to this question. These statements were the only time the shackles were mentioned in the record.

We are unable to determine on this record whether the trial court determined that "a state interest specific to the trial" was served by use of the ankle restraints. *Deck*, 544 US at 629; See also *Dunn*, 446 Mich 409. Nevertheless, even assuming that plain error existed, defendant cannot demonstrate that the plain error affected his substantial rights. Defendant confessed that he woke the victim, who was his step-grandfather, and asked him where his hammers were located. He stated that he retrieved the hammers, went back to the victim's bed, beat him in the head with the hammers while he slept, and then placed the hammers under the victim's bed. Officers who arrived on the scene observed the victim's dead body in his bed and two hammers underneath the bed. Defendant's mother testified that defendant telephoned her after beating the victim and told her that he hit the victim in the head with a hammer because they had fought about defendant's aunt. Defendant testified that he killed the victim because the victim molested defendant and his aunt when they were children. In light of this overwhelming evidence, defendant is unable to carry his burden of persuasion that the ankle shackling affected the outcome of the trial. *Carines*, 460 Mich at 763.

Defendant also argues that his Sixth Amendment right to a fair trial was violated because he received ineffective assistance of counsel. Where, as here, defendant has failed to move for a new trial or evidentiary hearing, this Court's review of the issue is limited to mistakes apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

A valid ineffective assistance of counsel claim requires fulfillment of a two prong test: whether “counsel’s performance was deficient,” and whether the “deficient performance prejudiced the defense so as to deprive the defendant of a fair trial.” *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995), quoting *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). The deficiency prong is met if the defendant can show that “his attorney performed below an objective standard of reasonableness under prevailing professional norms.” *People v Pickens*, 446 Mich 298, 343; 521 NW2d 797 (1994). The prejudice prong is met if the defendant can show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 315.

Even assuming that counsel failed to object to the shackling and that the failure to object fell below an objective standard of reasonableness, defendant cannot show prejudice. There was overwhelming evidence of defendant’s guilt; and defendant has not shown that “there is a reasonable probability that, but for counsel’s [failure to object to the shackles], the result of the proceeding would have been different.” *Pickens*, 446 Mich at 343.

Defendant also contends that the trial court abused its discretion by precluding three of his aunts from testifying and that this evidentiary ruling violated his Sixth Amendment right to present a defense. We review for an abuse of discretion a trial court’s decision to admit or exclude evidence. *People v Steele*, 283 Mich App 472, 478; 769 NW2d 256 (2009). “A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes.” *People v Duncan*, 494 Mich 713, 723; 835 NW2d 399 (2013) (citation omitted).

MRE 401 defines “relevant evidence” as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” “Relevant evidence thus is evidence that is material [(r)elated to any fact that is of consequence to the action) and has probative force (any tendency to make the existence of a fact of consequence more or less probable than it would be without the evidence).” *People v Sabin* (After Remand), 463 Mich 43, 57; 614 NW2d 888 (2000).

Defendant contends that his aunts would have offered evidence bearing on his state of mind when he killed the victim and that this evidence is relevant because it would have made it less probable that he premeditated the victim’s death. However, defendant’s argument overlooks the fact that he was unaware that the victim molested his other aunts. Logically, if defendant was unaware that such molestation occurred, his mind could not have been affected by its occurrence. Further, evidence of other sexual abuse of which defendant was unaware was not relevant to the credibility of witness Michelle Creek as defendant suggests. Creek’s testimony was not offered to prove that the victim molested her but, rather, to show that defendant *believed* the victim molested her and that this belief impacted his state of mind. Testimony regarding molestation of defendant’s other aunts was not relevant to Creek’s credibility because it would not have “made it more or less probable,” *Sabin*, 463 Mich at 57, that Creek and defendant actually discussed the sexual abuse of Creek. The exclusion of the evidence also did not deprive defendant of his Sixth Amendment right to present a defense. “[T]he Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.” *Crane v*

*Kentucky*, 476 US 683, 690; 106 S Ct 2142; 90 L Ed 2d 636 (1986) (citation and quotations omitted). “However . . . it is not an absolute right, and the accused must still comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.” *People v Kowalski*, 492 Mich 106, 139; 821 NW2d 14 (2012) (citations and quotations omitted). The trial court properly applied MRE 401 and concluded the testimony at issue was irrelevant and inadmissible.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Jane E. Markey

/s/ Jane M. Beckering